



ASSOCIATION OF AMERICAN RAILROADS

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October 11, 2011

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

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Re: Finance Docket No. 35468, *Pinelawn Cemetery—Petition for Declaratory Order*

Dear Ms. Brown:

By this letter, the Association of American Railroads ("AAR") wishes to bring to the attention of the Surface Transportation Board ("STB") the AAR's concern that the above-cited case has the potential to raise an issue of significant importance to the rail industry as a whole. That issue is whether the STB can be deemed to have lost its exclusive and preemptive jurisdiction under 49 U.S.C. § 10501 (b) (2) over rail transportation facilities owned or leased by a rail carrier as a result of the carrier's entering into a temporary, limited-term lease or operating agreement with a non-carrier regarding such facilities, including for purposes that relate to the carrier's rail transportation operations.

The AAR is a trade association representing the nation's major freight railroads as well as many smaller railroads; and the AAR frequently appears before the Board in matters of significant interest to the railroad industry.¹ The AAR believes that existing Board and judicial precedent strongly support the proposition that permission granted by a carrier to a non-carrier for temporary, limited-term use of rail facilities does not demonstrate an intent by the carrier to abandon the property for present or future rail transportation purposes nor does it serve to convert rail-owned transportation facilities into "private property" beyond the Board's preemption powers.² Accordingly, the AAR urges that the Board give careful consideration to

¹ The New York and Atlantic Railway Company, which is a party to the subject proceeding, is a subsidiary of Anacostia Rail Holdings Company, Inc. and a member of the AAR.

² See, e.g., *Cedarapids, Inc. v Chicago, Central & Pacific R. Co.*, 265 F. Supp. 2d 1005, (N.D. Iowa 2003) ("The ICCTA by its terms makes it clear that the STB has *exclusive jurisdiction* over the abandonment of tracks, including wholly intrastate spur and side tracks"); STB Finance Docket No. 35196, *Norfolk Southern Railway Company and*

the potential consequences of any Board decision that would find that the STB's broad preemption authority under 49 U.S.C. § 10501 (b) (2) no longer continues to protect rail transportation facilities from state or local laws or requirements that would prevent or unreasonably interfere with current or future interstate rail transportation.

The AAR does not, by this letter, address the specific facts presented in the above-cited case. However the AAR wishes to note that there are often instances where a rail carrier allows temporary use of rail property by non-rail carriers for both transportation and other purposes. In such cases, the rail property may provide non-operating revenue to the rail carrier which it can use for rail transportation purposes or may provide convenient access by the carrier to transportation-related services. At the same time, under such temporary arrangements, the rail carrier still retains the property for the provision of rail transportation services should present or future needs require such services. Such interim non-carrier uses of rail property are supportive of rail transportation and should not jeopardize the long-term availability of railroad real estate. The AAR accordingly urges the STB in the above-cited proceeding to adhere to the precedent that temporary use of a rail carrier's facility by a non-carrier does not demonstrate a rail carrier's intent to permanently abandon such property for rail transportation purposes.

The AAR recognizes that the record has already closed in the subject proceeding. However, in view of the rail industry concern noted above, the AAR respectfully petitions, pursuant to 49 C.F.R. 1117.1, that the Board accept this letter in the docket in the proceeding. Copies of this letter have also been sent by express courier to counsel for the parties shown below.

Respectfully submitted,



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the Alabama Great Southern Railroad Company—Petition for Declaratory Order (served March 1, 2010), Slip op. at 3, n.5 (noting that the agency's "regulatory mission" in preserving rail property from local condemnation actions comes to an end only after railroad property has been lawfully abandoned); see also Slip op. at 4 (carrier's future need of property for railroad purposes must be taken into account by Board in determining whether carrier property may be taken pursuant to local condemnation proceeding); see also STB Finance Docket No. 34425, *City of Lincoln—Petition for Declaratory Order* (served Aug. 12, 2004), *aff'd City of Lincoln v. STB*, 414 F.3d 858, 862 (8th Cir. 2005) (*accord*) (also noting that "[c]ondemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right-of-way may become necessary for railroad uses").

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